STATE OF MICHIGAN

COURT OF APPEALS

SANDRA HERMANN, Plaintiff-Appellant,	UNPUBLISHED January 24, 2012
v	No. 301048 Midland Circuit Court
MIDMICHIGAN HEALTH, Defendant-Appellee.	LC No. 09-006250-NZ

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this suit alleging wrongful termination, plaintiff Sandra Hermann appeals by right the trial court's order granting defendant MidMichigan Health's motion for summary disposition and dismissing her claims. Because we conclude that the trial court properly granted MidMichigan Health's motion, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

MidMichigan Health is the parent corporation for a group of affiliated entities; the affiliated companies are collectively referred to as the MidMichigan Health System.

In 1978, Hermann began working for what would eventually be known as MidMichigan Regional Medical Center, which was one of MidMichigan Health's hospitals. She initially worked as a social worker for the Medical Center, but soon became the manager of the psychology and social work department. Hermann rose to the position of vice president in 1985. However, Hermann decided to move to a management consulting firm in 1989. She remained with the consulting firm until 1995.

Some months after the management consultation firm went out of business, Hermann applied for a position with an insurance management company that was affiliated with MidMichigan Health. She learned about the opening from a former coworker at the Medical Center, Donna Rapp. Hermann worked for the affiliate until 1999, when MidMichigan Health hired her to be the vice president of corporate planning.

As the vice president of corporate planning, Hermann worked with MidMichigan Health's then president, Terence Moore, to develop a strategic plan for the whole MidMichigan Health System. She stated that she was responsible for the strategic plan for the individual affiliates and assisted with "the integration of all the affiliates." She was also responsible for getting any necessary approval from state regulators—referred to as a certificate of need—for new projects that were being developed for the MidMichigan Health System.

In 2004, Richard Reynolds became the president of the Medical Center. Although Hermann was the vice president of corporate planning, Reynolds preferred to work with Rapp, who had since become a senior vice president with MidMichigan Health, on the development of a strategic plan for the Medical Center. Therefore, Rapp developed the plan for the Medical Center and Hermann developed the plan for the remainder of MidMichigan Health's affiliates.

Reynolds became the president of MidMichigan Health after Moore retired in 2008. Reynolds reorganized MidMichigan Health's corporate staff and made Rapp responsible for corporate planning. Thereafter, Hermann reported to Rapp on planning matters, rather than reporting directly to the president. Reynolds also asked Rapp to lead a planning group that was comprised of Rapp, Hermann and Tricia Sommer, who was the director of planning for the cardiovascular unit at the Medical Center.

In late 2008 and early 2009, MidMichigan Health began to experience some financial difficulties. Because MidMichigan Health's primary expense is related to employee compensation, the management decided to reduce the staff. Rapp recommended that Hermann's position be eliminated. Reynolds adopted Rapp's recommendation after consulting with the other officers. In September 2009, Rapp and the vice president of human resources, Lynn Bruchhof, went to Hermann and informed her that she had been terminated. Bruchhof gave Hermann a proposed severance agreement, but she refused to sign it. Bruchhof also gave Hermann the option of characterizing her termination as a resignation or retirement. After Hermann's termination, Rapp, Sommer and Hermann's administrative assistant, Jane Medley, each assumed portion's of Hermann's planning duties.

In November 2009, Hermann sued MidMichigan Health. She alleged that MidMichigan Health wrongfully terminated her employment on the basis of her age. She later amended her complaint to include a sex discrimination claim. In response, MidMichigan alleged that it did not terminate Hermann on the basis of her age or sex, but eliminated her position as a part of a plan to reduce the staff at its corporate level.

MidMichigan Health moved for summary disposition in July 2010. MidMichigan Health argued that there was no evidence that Hermann's age or sex played a role in the decision to terminate her position. It also argued that the undisputed evidence showed that it was under financial strain and that it had a legitimate reason for terminating her position.

In response to this motion, Hermann, who was born in 1951, presented evidence that she claimed showed that the decision to terminate her position was motivated by her age.[1] Specifically, she relied on evidence that, shortly after he became MidMichigan Health's president, Reynolds made Power-Point presentations, which included a slide that warned that transformational changes were coming as a result of an aging workforce. She also relied on evidence that, when she was told of her termination, Bruchhof told her that she should characterize her termination as a retirement that would enable her to stay home and play with her granddaughter. The Power-Point slide along with Bruchhof's suggestion, she maintained, constituted direct evidence that MidMichigan Health's decision to terminate her position was—at least in part—motivated by unlawful age discrimination.

Hermann also presented evidence that she believed showed that MidMichigan Health offered more generous severance packages to two men whose positions were terminated, which included consultation contracts. She maintained that this evidence supported a prima facie case of sex discrimination.

The trial court held a hearing on MidMichigan Health's motion in September 2010 and issued its opinion and order granting the motion in October 2010. In its opinion, the trial court explained that Reynold's Power Point presentation was not direct evidence that age was a factor in the decision to terminate Hermann's employment. Rather, the evidence showed that the concerns about the aging workforce referred to the challenge that MidMichigan would face in securing qualified personnel to replace the people who would be retiring and to meet the needs of a growing customer base. The trial court also determined that the MidMichigan Health's invitation to characterize Hermann's termination as either a resignation or retirement was not evidence that permitted an inference that the decision to terminate her was motivated by age discrimination. Finally, it concluded that Hermann was not similarly situated to the men who were terminated. As such, it concluded that Hermann had not established a prima facie case of discrimination premised on gender. For these reasons, it granted MidMichigan Health's motion for summary disposition and dismissed both Hermann's claims.

This appeal followed.

II. UNLAWFUL TERMINATION

A. STANDARD OF REVIEW

On appeal, Hermann argues that the trial court erred when it determined that she failed to establish a prima facie case of age discrimination under the Elliott-Larsen Civil Rights Act.[2] See MCL 37.2101 *et seq*. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Eng, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

[1] We note that both Reynolds and Rapp are older than Hermann.

[2] Hermann has not appealed the trial court's decision to dismiss her sex discrimination claim.

B. ESTABLISHING A CLAIM UNDER THE CIVIL RIGHTS ACT

Under the civil rights act, an employee may not be discharged or otherwise discriminated against with respect "to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . ." MCL 37.2202(1)(a). A plaintiff alleging age discrimination may establish a prima facie case by presenting direct evidence that his or her employer took an adverse employment action on the basis of her age. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). However, if there is no direct evidence that the employer's decision was motivated by age, the plaintiff may establish a prima facie case through indirect evidence of age discrimination. To do this, the plaintiff must present evidence from which a finder of fact could infer that the plaintiff was a victim of unlawful discrimination using the burden shifting approach established in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Hazle*, 464 Mich at 462. Under the burden shifting approach, the plaintiff must present evidence that he or she (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) the action was taken under circumstances giving rise to an inference of unlawful discrimination. *Id.* at 463. Once a plaintiff presents sufficient evidence to establish a prima facie case in this manner, a presumption of discrimination arises. *Id.* The presumption arises because it is presumed that the adverse action, if otherwise unexplained, was more likely than not based on the consideration of impermissible factors. *Id.* However, this presumption is rebuttable; if the employer presents evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason, the presumption created by the prima facie case drops away. *Id.* at 464-465. At that point, the plaintiff must present evidence from which the finder of fact could infer that the proffered reason was a mere pretext for unlawful discrimination. *Id.* at 465-466.

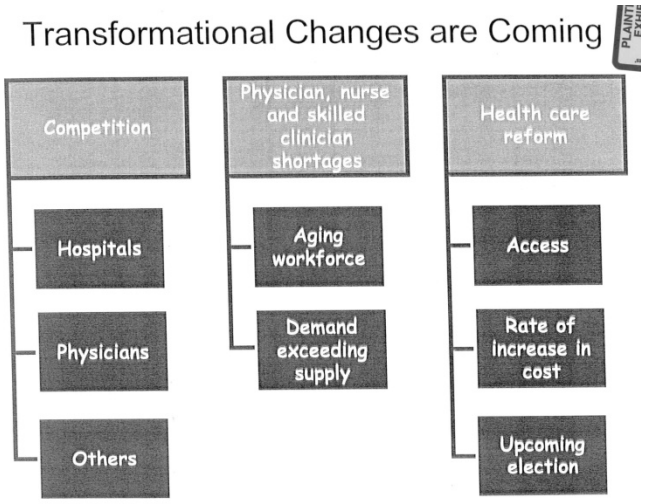
C. AGE DISCRIMINATION

On appeal, Hermann's sole statement of the question presented involved whether the trial court erred when it determined that she had not established a prima facie case of age discrimination under the burden-shifting approach. She argues that she presented evidence that—even if not direct evidence of discrimination—constituted indirect evidence that MidMichigan Health's decision to fire her was influenced by her age. Specifically, she contends that Reynolds' Power Point presentation and the comment that she should characterize her termination as a retirement, when considered with the evidence that a younger worker took over her job duties, constituted sufficient evidence to establish a prima facie case of age discrimination under the burden shifting approach. And, because she presented evidence that—if believed—could give rise to an inference that MidMichigan Health's economic reason for terminating her position was a mere pretext for unlawful discrimination, the trial court erred when it dismissed her age discrimination claim. Nevertheless, she states in her brief on appeal that the "statements contained within the Power Point presentation were not ambiguous and constitute a much clearer and unequivocal statement of intent to discriminate on the basis of age . . . ." She also repeatedly characterizes Bruchhof's suggestion concerning retirement as proof that age was a motivating factor in the decision to replace her. Therefore, for the sake of clarity, we shall address whether the trial court erred when it determined that the Power Point presentation and Bruchhof's statements constituted evidence that age discrimination played a role in Hermann's termination.

1. DIRECT EVIDENCE

In order to prove her sex discrimination claim, Hermann had to prove that there was a "causal link between the discriminatory animus and the adverse employment decision." *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 134-135; 666 NW2d 186 (2003). She could do this by presenting evidence that directly shows that the decision to terminate her was motivated by her age. *Id.* at 132. However, in order to constitute direct evidence, the evidence must show that MidMichigan Health's discriminatory animus played a role in the decision to terminate her position. *Id.* at 135 ("Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision."). That is, the evidence must be such that it "*requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, 464 Mich at 462 (emphasis added, quotation omitted). Direct evidence can take the form of statements that are made at the time of the adverse employment action that, if believed, show that the decision was motivated in part by a discriminatory animus. See, e.g., *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001) (noting that the plaintiff's employer's statement that the plaintiff was "too old for this shit" was direct evidence of discrimination because it was made at the time the employer fired the plaintiff); *Harrison v Olde Financial Corp*, 225 Mich App 601, 608 n 7, 610; 572 NW2d 679 (1997) (holding that comments that the plaintiff was a good secretary "but the wrong color" and that the plaintiff should not be permitted to address an interviewer by his first name because the plaintiff was black are direct evidence that the decision not to hire the plaintiff was at least partially racially motivated). However, generally, isolated or stray discriminatory remarks are not relevant to establish a causal connection between an employer's discriminatory animus and the decision to subject an employee to an adverse employment action. See *Krohn v Sedgwick James, Inc*, 244 Mich App 289, 297; 624 NW2d 212 (2001) (noting that an employer's remarks can fall on a continuum of relevancy and, for that reason, the trial court must consider several factors to determine whether the comment in issue is relevant to show that an employer took a challenged action on the basis of an employee's age). In this case, none of the evidence that Hermann cited before the trial court constituted direct evidence that the decision to terminate her position was motivated, even in part, by her age.

In opposition to MidMichigan Health's motion for summary disposition, Hermann argued that Reynolds had stated that he planned to replace older workers with younger workers. She relied heavily on a particular slide that Reynolds used in one or more presentations at around the time he became MidMichigan Health's president to establish this point. In this slide, Reynolds warned that transformation changes were coming:



When this slide is examined in its full context, it is difficult—if not impossible—to construe it as evidence that Reynolds, or anyone connected with the presentation, held a discriminatory animus against older workers. Although the slide lists "aging workforce" as a transformational change that is coming, it lists that category under the broader heading of "physician, nurse and skilled clinician shortages." Further, it places it in the context of "demand exceeding supply", an expected increase in the public's "access" to health care and in light of the potential for competition from other "hospitals" and "physicians." It is plain that the slide identifies the challenge posed by the aging workforce as the strain that it will have on MidMichigan Health's ability to meet the anticipated demand for medical services. Accordingly, while one might infer from this slide that Reynolds was concerned about MidMichigan Health's aging workforce, it is not reasonable to infer from it that Reynolds or anyone else held a discriminatory animus against older employees.[3]

Despite the plain import of the slide when examined on its own, Hermann nevertheless argued that the slide was evidence that Reynolds held a discriminatory animus because, after he presented the slide, it became clear from the discussion that he intended to put in place a plan to replace older workers. Hermann testified at her deposition that the discussion centered on the fact that "MidMichigan Health [had] an aging workforce . . . and that we at [MidMichigan] Health needed to start bringing in younger employees because . . . there was a number of individuals, again particularly at the administrative level, that would be retiring at about the same time." Even when viewed in the light suggested by Hermann with this testimony, the slide is still not evidence that Reynolds held a discriminatory animus against older workers and intended to act on that animus. Rather, the only reasonable understanding is that the slide and discussion were apparently directed at the need to take steps to ensure an adequate staff to meet a potential growth in the demand for medical services at a time when MidMichigan Health's work force might be shrinking through retirement. And, indeed, that is precisely how Reynolds explained the discussion at his deposition. Reynolds admitted that he was concerned about the aging

[3] There was evidence that Bruchhof made a similar presentation.

workforce; he was concerned because "our work force was getting older particularly in our clinical areas" at a time when the "overall population was aging and that there was more services being required as people aged . . . ." This, he felt, would put MidMichigan Health in a position where "we might not have enough people available to us to provide the [medical] services. And we needed to restructure the way we did things to make sure that we were actively recruiting new people into the work force, but also retaining those that were in the work force already." Accordingly, as the trial court correctly noted,[4] while the slide and testimony are evidence that Reynolds was concerned about how the aging work force might impact future development at MidMichigan Health, no reasonable understanding of this evidence could lead to an inference that Reynolds—or anyone else involved in the presentation—held a discriminatory animus against older workers.

Hermann also relied on the statements that Bruchhof made on the day of her termination as evidence that Reynolds had a bias against older workers. Hermann testified that Rapp and Bruchhof met with her and notified her that her position was being eliminated effective immediately. Hermann said that, after Rapp left the meeting, Bruchhof suggested that Hermann release a statement explaining her departure as a retirement;[5] Bruchhof asked her to "'just write down—you know, what we think is a good idea is that you say that you're retiring so you can stay home and play with your granddaughter.'" She refused, because that did not sound like her at all: "I never stayed home and played with my own children, and I'm thinking now I'm a grandmother? And I said no." Bruchhof then suggested that, given that she did not like the way that she had been treated over the past year, she could state that she was resigning, but Hermann did not like that idea either. Hermann testified that, at that point, Bruchhof stated "'Well, just, you know, just write something . . . because Rick [Reynolds] and Donna [Rapp] don't want to say that there is a downsizing.'" Hermann said she again refused to write out a statement.

Examining this testimony as a whole, it is not direct evidence that the decision to terminate Hermann was motivated by a discriminatory animus. Although Bruchhof suggested that Hermann might want to characterize her departure as a retirement, and did so in the context of her being a grandmother, it is plain from her follow-up statements that Bruchhof was trying to get Hermann to make a statement that explained Hermann's departure as voluntary. That is, while one might find the suggested statements to be unseemly under the circumstances, it apparent from the context that Bruchhof was not expressing a bias against older workers, but rather was trying to get Hermann to make a statement that would place a more favorable light on Hermann's departure. Therefore, even if we were to accept Hermann's assertion that Bruchhof made the suggestions on Reynold's behalf, it is not direct evidence of discrimination. *Hazle*, 464 Mich at 462. Indeed, it is not even circumstantial evidence that the decision to terminate Hermann was motivated by a bias against older workers.

---

[4] In its opinion, the trial court stated that Hermann's "argument takes the Power Point slide out of all reasonable context."

[5] Bruchhof testified that it is MidMichigan Health's policy to let a terminated employee write out a statement concerning the termination.

The trial court correctly concluded that this evidence was not direct evidence that the decision to terminate Hermann's position was motivated, in whole or part, by an improper discriminatory animus. Further, the trial court did not err to the extent that it determined that the evidence concerning the Power Point slide and the statements that Bruchhof made to Hermann were not evidence that Reynolds—or anyone else—held a bias against older workers.

2. INDIRECT EVIDENCE

In order to establish a prima facie case of discrimination using the indirect or burden-shifting approach, Hermann had to establish that she was a member of a protected class, suffered an adverse employment action, was qualified for the position, and that MidMichigan Health took the adverse employment action under circumstances giving rise to an inference of unlawful discrimination. *Hazle*, 464 Mich at 463. Here, it is undisputed that Hermann was a member of a protected class, suffered an adverse employment action and was qualified for the position. The only dispute concerns whether she presented evidence that, under the circumstances, gave rise to an inference that MidMichigan Health terminated her position on the basis of her age.

Typically, in order to establish circumstances that give rise to an inference of unlawful discrimination, a plaintiff must present evidence that he or she was treated differently than similarly situated persons of a different class for the same or similar conduct. See *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997); *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999). In this case, Hermann contends that she established the fourth element of her prima facie case by showing that she was replaced by a younger worker. Our Supreme Court has also stated that a plaintiff alleging age discrimination can establish this element of his or her prima facie case by presenting evidence that the employer replaced her with a younger employee. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). However, a "'person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work.'" *Id.* at 177-178 n 27, quoting *Barnes v GenCorp Inc*, 896 F2d 1457, 1465 (CA 6, 1990).

Hermann maintains that she presented evidence that MidMichigan Health replaced her with Sommer, a younger employee. However, there is undisputed evidence that Hermann's duties were assumed by multiple employees. Rapp testified she herself absorbed a portion of the work along with Sommer and Medley. Further, the evidence shows that they were already working within the MidMichigan Health System. Moreover, it is undisputed that Sommer did not move to MidMichigan Health to replace Hermann; she worked—and still works—for the Medical Center.

Sommer testified at her deposition that she moved to the Medical Center from a separate affiliate in 2005 at Reynold's request. He wanted her to perform all aspects of the business planning and implementation of the expansion of the Medical Center's cardiovascular services. After that move, she took the title of Director of Planning, Cardiovascular Services. Sommer stated that directors are inferior to vice presidents, to whom they usually report.

Sommer said that her work with the cardiovascular expansion included market analysis, demand analysis, and an application for a certificate of need. She also began to work with new business development, including the acquisition of existing practices in new markets. At that time, she reported to Reynolds as the Medical Center's CEO. After Reynolds became MidMichigan Health's president, he had her report directly to Rapp. She also began working with Reynolds, Rapp, and Hermann on developing the strategic plan for MidMichigan Health. After Reynolds authorized Hermann's termination, Sommer retained her title, salary, and stated that she received a smaller bonus than the previous year. However, she did take over responsibility for certificates of need. Nevertheless, 95% of her duties were the same as before.

Accordingly, there is no evidence that Hermann was replaced by anyone, let alone a younger worker. Rather, MidMichigan Health apportioned the work that had been done by Hermann to persons who were already performing planning and development work with MidMichigan Health or one of its affiliates. See *Lytle*, 458 Mich at 177-178 n 27. We also cannot agree with Hermann's contention that, because Sommer works for the Medical Center and yet performs work for that would have been performed by an employee at MidMichigan Health, she must be treated as having taken on a "second job" with MidMichigan Health. It is clear from Sommer's testimony that she already had some role in planning when she worked for Reynolds at the Medical Center and that her involvement increased after Reynolds moved to MidMichigan Health. Indeed, the undisputed evidence showed that Reynolds had Sommer report directly to Rapp and involved her in the strategic planning even before he authorized Rapp to terminate Hermann's position. Hence, the changes to Sommer's duties cannot fairly be characterized as taking on a second job. Moreover, that Reynolds outsourced a portion of Hermann's duties to an affiliate's employee does not cause the affiliate's employee to become MidMichigan Health's employee. Consequently, there is no evidence that MidMichigan Health replaced Hermann after the termination of her position—let alone that it replaced her with a younger worker.

We also reject the argument that the evidence that Sommer took over a portion of Hermann's responsibilities, when considered in light of the Power Point presentation and Bruchhof's remarks, collectively constitutes evidence from which one might infer that Reynolds or Rapp terminated Hermann's position on the basis of her age. The evidence concerning the Power Point presentation and those remarks does not constitute evidence that Reynolds—or anyone else—had a discriminatory animus. As such, that evidence does not shed any additional light on the evidence that Sommer took over a portion of Hermann's job responsibilities.

The trial court did not err when it determined that Hermann had not presented sufficient evidence to establish her claim of age discrimination.

III. CONCLUSION

The trial court correctly concluded that Hermann did not present any direct evidence that the decision to eliminate her position was causally linked to a discriminatory animus. *Hazle*, 464 Mich at 462. Likewise, the trial court did not err when it determined that Hermann had not presented evidence that, if believed, would give rise to an inference of unlawful discrimination. *Id.* at 463. Consequently, the trial court did not err when it granted MidMichigan Health's motion for summary disposition.

Affirmed. As the prevailing party, MidMichigan Health may tax its costs. MCR 7.219(A).

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly